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THE CONSTITUTIONALITY AND EXPEDIENCY OF CONFISCATION VINDICATED.

SPEECH

OF

HON. LYMAN TRUMBULL, OF ILLINOIS,

ON THE

BILL TO CONFISCATE THE PROPERTY AND FREE
THE SLAVES OF REBELS;

DELIVERED

IN THE SENATE OF THE UNITED STATES, APRIL 7, 1862.

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SPEECH.

The Senate having resumed the consideration of the bill (S. No. 151) to confiscate the property and free the slaves of rebels—

Mr. TRUMBULL said:

Mr. President, before proceeding with the remarks which I design to make upon this bill, I desire to move two amendments, one of which is verbal, and the other is to make the bill a little more definite. In the fourth line of the seventh section, I move to strike out the words "garnishee and," and to insert in lieu thereof the words, "process of garnishment and other," so that it will read:

That the several district courts of the United States are hereby invested with power to issue all processes whether mesne or final as well in chancery and admiralty as at common law, including process of garnishment and other process as in cases of foreign attachment, and to do every other matter and thing necessary or proper to carry out the purposes of this act.

The amendment was agreed to.

Mr. TRUMBULL. I desire to move another amendment in the thirteenth line of the first section of the bill, after the word "and," to insert the words "as to all property which shall be seized and appropriated as hereinafter provided;" so that the clause will read:

Owing aid and comfort to said rebellion, shall be forfeited and confiscated to the United States, and as to all property which shall be seized and appropriated as hereinafter provided, such forfeiture shall take immediate effect upon the commission of the act of forfeiture, &c.

The amendment was agreed to.

Mr. TRUMBULL. Mr. President, having made a brief explanation of the main features of the bill under consideration, and the principles on which it was based, at the time it was reported to the Senate, it was not my intention to have said anything more upon it, at all events, unless in closing the debate; but the fierceness with which

it has been assailed, and the misrepresentations to which it has been subjected, unintentional of course, make it necessary that I should reply to some of the strictures upon it. Assuming that it was a sweeping measure for the confiscation of all the property in the southern States, the bill has been denounced as unconstitutional and inexpedient with a vehemence and virulence not to have been expected, and surely but illy calculated to promote that calm, deliberate, and candid consideration which the admitted importance of the subject should command. The Senator from California [Mr. McDougall] denominated it "an act to sweep the whole of a populous country of all property, real and personal."

The Senator from Pennsylvania, [Mr. Cowan,] after assuming that it would be "moderate to estimate" the number of persons to be affected by the bill at four millions, said:

"This bill proposes at a single stroke to strip all this vast number of people of all their property, real, personal, and mixed, of every kind whatsoever, and reduce them at once to absolute poverty."

My colleague [Mr. Browning] said the bill "strikes at all the property of every kind and character of all the citizens of the seceded States with scarcely an exception."

The Senator from Virginia [Mr. Carlile] said:

"It will be seen that all the property of each and every citizen in the seceded States will be forfeited under this bill."

How grossly these Senators have misconceived the character of the bill will be apparent on a glance at its provisions. So far from striking at all the property of each and every citizen in the seceded States, it would not probably reach the property of one in ten of the *rebels*, and in no case would touch the property of a loyal citizen. In the first place, the bill is prospective in its opera-

tion, and confiscates the property of no one for anything done before its passage. It would be in the power of every rebel in the land to save his property from confiscation by ceasing to war against the Government from the time of its passage. Secondly, it only applies to the property of such rebels as are beyond the reach of judicial process. Wherever the *person* of the rebel can be reached and made subject to the punishment his crimes deserve, the bill does not propose to touch his property. In all the loyal States, including Missouri, Kentucky, and a large part of Tennessee and Virginia, the only persons whose property could be touched by the bill would be those who abandoned it, and fled to other States to fight against the Union. How different is such a bill, and how harmless compared with the radical measure which has so alarmed the Senator from Pennsylvania that he declared its passage would do what treason could not, that "we ourselves will then have dissolved the Union!" What makes the course of some Senators who have spoken against this measure the more remarkable is the fact that two of them, at least, the Senator from Pennsylvania and my colleague, after denouncing the confiscation of rebel property to a limited extent, under an act of Congress, as something monstrous and horrible, before concluding their speeches, both avow themselves in certain contingencies not only in favor of the confiscation or destruction of the property of rebels, but of arming their negroes to fight against them. Their trouble seems to be, lest confiscation should be regulated by law, and not left, as they insist it ought to be, to the arbitrary discretion of the Executive. That I may not do injustice to any one I will read a few paragraphs from the speech of my colleague on this bill. He said:

"The inexpediency of this bill is as manifest as its unconstitutionality. Let it pass, and its provisions be heralded in advance of the Army as it marches South, and what other effect can it have than to consolidate the entire people for one last despairing struggle against those whom they might then justly regard as enemies and oppressors instead of friends and benefactors? What possible inducement could they have to prefer submission to death? For one, I do not wish to waste the fortunes and devastate the homes of all. Leave something to make the guardianship of Government and the protection of law desirable."

In a subsequent portion of his speech my colleague said:

"The Government has the right and power, and ought to exercise them, to seize and confiscate all the property, of every character, including slaves, of those in armed rebellion against the Government, or who may give aid and

comfort to those in arms, so far as such property may come within the reach of our Army, and so far as its seizure and confiscation may have any relation to the end and object of the war, and may tend to cripple and subdue the enemy or strengthen us, and promote the success of our arms; and it is the duty of the Government to exercise this right, and to apply such property to the uses to which it is best adapted to aid in the successful prosecution of the war, in defraying its expenses and lightening its burdens on loyal citizens.

"To accomplish this, neither legislation nor adjudication is necessary. The power is a war power—the right is a belligerent right. These principles are as applicable to slaves as to other property, and no officer should be permitted to use the forces under his command in repelling fugitives from the lines, or in arresting and returning them to rebel masters; but they should be received, and used in whatever way they could be made most available and efficient in the prosecution of the war; and if any come, whose services cannot be made available, let them pass through the lines and shift for themselves. The Army is not bound to take care of them, and cannot have them as camp followers, to be provided for at the expense of the Government. All who can be advantageously used should be used. Let them do the drudgery and labor which would otherwise devolve on our soldiers. Let them open roads, build bridges, dig ditches and trenches, erect fortifications, and do labor of every kind which may be needed by a large army; and if need be to save the Government from overthrow, the country from ruin, and our homes from desolation, let them be formed into companies and regiments, and drilled and disciplined and armed, to take their chances for wounds and death in the front of battle."

I do not read these passages for the purpose of exposing the inconsistency of my colleague, for it seems, after all, that it is not so much the confiscation of rebel property that he is opposed to as the manner in which it is done, he insisting "that neither legislation nor adjudication" is necessary to accomplish the object; a position which I shall hereafter undertake to show is wholly untenable, and at war with both the spirit and letter of the Constitution. That the Constitution puts the force of the nation into the President's hands, "investing him with the war-making power" which he may direct and control as he pleases, "and only restrained in so far by Congress in that he must depend upon them to foot his bills and authorize his levies," as insisted by the Senator from Pennsylvania, [Mr. Cowan,] I wholly deny. There is no warrant in the Constitution for the assumption of such powers by the Executive. So far from it, the war-making power is, by the Constitution, expressly vested in another department of the Government, and, as I shall presently show, the Supreme Court has decided that the power to confiscate enemy property does not reside in the Executive but in Congress, and nowhere else. And yet, strange as it may seem, these advocates

of prerogative, who claim war powers for the President higher and above and beyond the Constitution, are alarmed beyond measure at the bare proposal to enact a law whereby rebel property, to a very limited extent, may be appropriated to the expenses of the war.

As all the Senators who have spoken against the bill have made the same class of objections, I will reply to them somewhat in detail, though, I must confess, without much hope of gaining their support to the measure, since they are evidently hunting for objections, and would doubtless imagine others, if those already suggested were removed; for in their sympathy for rebels, whom they style brethren, they have vastly magnified the proportions of this bill, as has already been shown; and I can only regard the claim of power of confiscation in the President as a counter proposition to defeat this, for we all know that the President does not pretend to exercise any such power; that he, in fact, has rebuked a distinguished general for attempting to exercise it; and I shall undertake to show before I conclude that he could not constitutionally exercise such a power if he would.

By way of meeting the objections to the pending bill, I will take up the speech of the Senator from Pennsylvania, [Mr. COWAN,] which embodies most of them, and endeavor to show, as I think I can, that they are all unfounded.

That I may not misstate his objections, I read from his speech. He said:

"Congress cannot forfeit the property of rebels for longer than their lives, by the enactment of any law whatever, for the following reasons:

"1. Those persons now in rebellion, having levied war against the United States, are guilty of treason within the exact definition of that crime contained in the third section of the third article of the Constitution, in which it is declared that

"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

"Hence, it cannot be doubted but that as soon as the rebels are arrested and brought within the power of any law we may pass, they become *eo instante* traitors, and obnoxious to the punishment which is imposed by our statute for treason." * * * * *

"The second clause of that same section provides further, that

"The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted."

"Therefore any law made for the guidance of the courts must conform to this provision, and no other or greater penalty could be imposed than it would warrant. If, therefore,

the law was to enact an absolute forfeiture of the estates of the traitor, it would be bad for the excess, and the judges would be obliged to make the sentence constitutional, either by cutting down the statutory penalty to a forfeiture of his estates for life, or by omitting to forfeit them at all. All this seems to me so obvious as not to be doubted."

The answer to all this is to be found in the fact that the bill does not propose to confiscate either absolutely or for life the property of rebels who are or can be arrested. If, therefore, it were admitted that it is not in the power of Congress to forfeit the property of rebels who are arrested and convicted of treason for longer than their lives, it could have no bearing upon this bill, for the simple reason that this bill only aims to reach the property of such rebels or traitors as are beyond the reach of judicial process, and can neither be arrested, tried, or convicted for treason or any other offense. Surely the prohibition against confiscating beyond life the property of the man who is arrested and made to suffer in his person for his crimes cannot prevent the absolute confiscation of the property of the criminal who is beyond our reach, and cannot be arrested, but who has left property within our jurisdiction, which we can reach.

Suppose a foreigner were engaged in this rebellion against the Government, it is clear that such a person, owing no allegiance to the Government, could not be convicted of treason; does it therefore follow that his property within our jurisdiction could not be confiscated? Or in case of the rebellious citizen who flees beyond the jurisdiction of the country, is his offense to be considered as beyond the reach of the Government, even to forfeit his property within its territorial boundary? It is manifest that the clause of the Constitution limiting the punishment for treason can have no more application to the confiscation of the property of a person who cannot be arrested and tried for treason than has the punishment prescribed by statute for murder to do with that for larceny.

The Senator from Pennsylvania further objects to the constitutionality of the bill—

"Because,

"1. By the fifth amendment to the Constitution, it is provided:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private

property be taken for public use without just compensation."

"Here it is attempted to deprive a large class of persons of all their estates and property, without any arrest, without any presentment by a grand jury, without any trial by a petit jury, without, indeed, any trial at all in any court. This would be to deprive them of their property in the very face of the provision requiring that it shall only be done 'by due process of law,' which all commentators and all lawyers agree, means proceedings according to the course of the common law."

It will be observed that the fifth amendment throws the same and even stronger safeguards around the life and liberty of a person than around his property, for the reason, doubtless, that life and liberty are more valuable than property. If, then, it is unconstitutional "to deprive a large class of persons of all their estates and property without any arrest, without any presentment by a grand jury, without any trial by a petit jury, without, indeed, any trial at all in any court," is it not equally unconstitutional to deprive them of life or liberty except by "due process of law?" Is it then unconstitutional to shoot and take prisoners the rebels on the battle-field? Are the patriotic soldiers who do it murderers? Would the Senator from Pennsylvania have a presentment by a grand jury and a trial by a petit jury on the field of battle of each person in the enemy's ranks who was firing upon our soldiers, in order that he might not be shot and deprived of life in the very face of the provision requiring that it shall only be done "by due process of law, which all commentators and all lawyers agree means proceedings according to the course of the common law?" Is it not clear that if we cannot take the property of our enemies in war except "by due process of law," neither can we take their lives in any other way?

What is the answer to all this? How is it, in the face of the fifth amendment, that Congress may provide for taking the lives and property of rebels without "due process of law?" The answer is to be found in the grants of power in other parts of the Constitution, which declare that Congress shall have power "to declare war," and "make rules concerning captures on land and water;" "to raise and support armies;" "to provide and maintain a Navy; to make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." These provisions of the Constitution do not mean that Con-

gress may raise armies and call forth the militia to suppress insurrection "according to the course of the common law," but to put it down by force and violence. It is because the peace cannot be preserved, the enemy overcome, and the rebellion suppressed by proceedings according to the course of the common law that the Army is called into being, and when so called into being it operates, not according to the course of the common law, but according to the usage of armies engaged in war in dealing with their enemies. Hence the authority of the Army by violence to deprive an enemy of life, liberty, and property in time of war is as ample as that of the courts to deprive a person of either by due process of law in time of peace, for the reason that it is by force and violence that armies overcome their enemies; and when the Constitution conferred on Congress the power to raise and support armies, it conferred also, as incident to that power, the authority to use them in the manner that armies are accustomed to operate.

The Senator from Pennsylvania and my colleague further object that this bill is obnoxious to the clause of the Constitution which declares that "no bill of attainder or *ex post facto* law shall be passed." The Senator from Pennsylvania admits that the bill is not within the letter of the Constitution, but thinks it within its spirit. My colleague, less liberal, and without, as I think, his usual fairness and candor in the argument of a question, disposes of the bill in a single sentence by saying, "I believe it is not denied that this is a bill of attainder within the meaning of the Constitution." Is my colleague so uncharitable as to suppose I would advocate a measure which I believed unconstitutional? I, who have declared in my place during the present session that I "want no other authority for putting down even this gigantic rebellion than such as may be derived from the Constitution, properly interpreted;" that "while fighting this battle in behalf of constitutional liberty, it behooves us especially to see to it that the Constitution receives no detriment at our hands;" and who have warned my countrymen "not to sanction usurpations of power which may hereafter become precedents for the destruction of constitutional liberty?"

No, sir, if I admitted this to be a bill of attainder, it would of course be an admission that it was unconstitutional, and it could not for a moment receive my support. The remark of my colleague, that he believed "no one denied that this is a bill of attainder," is still the more remarkable, when

taken in connection with what I said in explanation of the bill when it was reported to the Senate. This was my language:

"Some have objected to the constitutional power to pass this bill because they say it is a bill of attainder. It is not a bill of attainder at all; it does not corrupt the blood of the party; but it is a bill, as I said, operating upon property. The Supreme Court of the United States has expressly decided in the case of *Brown vs. The United States*—which I referred to on a former occasion—that Congress has authority to pass an act of confiscation, and if Congress has authority to confiscate the property of an enemy, the act of confiscation must be something different from a bill of attainder, because the Constitution expressly declares that no bill of attainder shall be passed."

How, with this statement on the records of the Senate, made at the time the bill was reported for its consideration, my colleague could say that he believed "it was not denied that this is a bill of attainder," can only be accounted for on the supposition that in his confidence in his own opinions he did not take the trouble to inquire what others had admitted or denied. The only authority referred to by any Senator for denominating this a bill of attainder is a remark of Chief Justice Marshall, incidentally made, by way of illustration in the case of *Fletcher vs. Peck*, (6 Cranch,) when the question of bills of attainder was not before him, in which he said, "a bill of attainder may affect the life of an individual, or may confiscate his property, or both." Story and Kent both quote this remark of Judge Marshall in their commentaries; but this reiteration of an *obiter dictum* remark by commentators adds nothing to it as an authority. To this incidental remark of Judge Marshall, made in a case in which the power to pass bills of attainder, or what they were, was not involved, I oppose the solemn decision of the same judge, at a later period, in the case of *Brown vs. The United States*, (8 Cranch,) in which he held that it was competent for Congress to pass a confiscation act. The force of this authority cannot be avoided by saying that Judge Marshall was deciding upon the right to confiscate the property of a foreign enemy when he declared "the power of confiscating enemy's property is in the legislature," for if a confiscation bill is the same thing as a bill of attainder, Congress could no more pass such an act in regard to the property of a foreign than a domestic enemy, because the language of the Constitution is that "no bill of attainder shall be passed," which renders it just as unconstitutional to pass such a bill affecting a foreigner as a citizen.

But I will undertake to show that the bill under

consideration is in no sense a bill of attainder. It does not propose to attain any one, or to affect any one's person or blood. It does not name any one on whom it is to operate, but simply provides for the forfeiture of the property of persons guilty of certain offenses, who themselves are beyond the reach of courts, and cannot be brought to trial, the forfeiture to be enforced in the loyal States through the courts, by proceedings *in rem*, and in the disloyal States, in which the courts are overborne, to be enforced, from the necessity of the case, through the military power. Such a bill has none of the characteristics of an attainder, which may be defined to be "that extinction of civil rights and capacities which takes place whenever a person who has committed treason or felony receives sentence of death for his crimes." Bills of attainder are, moreover, directed against some particular person or persons by name, who are thereby attainted for some crime already committed. This bill provides for the forfeiture of estates in certain cases as a punishment for crime hereafter to be committed, when the person of the individual committing the offense cannot be reached. It does not attain or convict any one of having committed a crime, nor of itself confiscate the property of any one, and is no more like a bill of attainder than is an act imposing a fine as a punishment for assault and battery, or forfeiture of goods as a penalty for smuggling.

The right to confiscate the property of a rebel or traitor attaches without any conviction of the offender. This bill applies only to proceedings *in rem*. It has nothing to do with the punishment of the person, and, indeed, does not operate upon the property of a person who is within reach of judicial process. In the case of *The Palmyra*, (12 Wheaton, 1,) the Supreme Court, in speaking of an act like this, say:

"Many cases exist where the forfeiture for acts done attaches solely *in rem*, and there is no accompanying penalty *in personam*. Many cases exist where there is both a forfeiture *in rem* and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. But the practice has been, and so this court understands the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by, any criminal proceeding *in personam*."

The Senator from California, to show why this bill ought not to pass, quotes from Story the following:

"It surely is enough for society to take the life of the offender, as a just punishment of his crime, without taking from his offspring and relatives that property which may be the only means of saving them from poverty and ruin."

So say I, and the bill does not propose to touch the property of any one whose life has been taken or who can be brought to trial for his crimes, and it is therefore not obnoxious to the objection pointed out by Story.

Another ground of objection to this bill is the allegation that it is an encroachment on the prerogative of the President, who, it is alleged, as Commander-in-Chief of the Army and Navy, already possesses the power of confiscation; that the extraordinary powers which the Government may wield in time of war, called war powers, belong to the President and not to Congress, and in support of this proposition my colleague cites the case of *Luther vs. Borden*, reported in 7 Howard. I will endeavor to show, as I think I can, that such claims of prerogative on the part of the President are unwarranted by the Constitution, against the practice of the Government from its foundation, and that the case of *Luther vs. Borden*, so far from being an authority for such assumption, is an authority against it.

1. There is not a syllable in the Constitution conferring on the President war powers. The Constitution simply makes him Commander-in-Chief of the Army and Navy when called into being, but he has no power to raise the one nor provide the other. As Commander-in-Chief when an army is raised, in the absence of any rules adopted by Congress for its government, he would have the right to control it, in the prosecution of the war, according to his discretion, not violating the established rules of civilized warfare, but he would not have the right to confiscate enemy property, because this is a power which can only be exercised in pursuance of an act of Congress, and does not belong to the Commander-in-Chief, who, as such, could only seize and hold property which was visible and tangible till the end of the war, when it would revert to its original owner.

The Constitution says, "Congress" (not the President) "shall have power to declare war; to raise and support armies," and to "provide and maintain a Navy." Story, in his Commentaries on the Constitution, says:

"The power to declare war is exclusive in Congress."
* * * * "It includes the exercise of all the ordinary rights of belligerents, and Congress may, therefore, pass suitable laws to enforce them. They may authorize the seizure and condemnation of the property of the enemy, within or without the territory of the United States, and the confiscation of debts due to the enemy."

2. When armies and navies are raised by Congress, of which the President is, by the Consti-

tution, made Commander-in-Chief, he can only govern and regulate them as Congress shall direct; because the Constitution says, "Congress shall have power to make rules for the government and regulation of the land and naval forces." As well might it be said that, because the Constitution declares that the President "shall take care that the laws be faithfully executed," he is therefore not bound, in discharging this duty, to conform his action to the manner prescribed by Congress, as that he can govern the Army as he pleases, irrespective of the rules which Congress has established.

3. It has been the practice of Congress, from the organization of the Government, to control the President in his government of the Army. The first Congress which met under the Constitution adopted the rules and articles of war for the government of the Army, as they existed under the Confederation and before we had a President. In 1806, Congress revised the rules and articles for the government of the armies of the United States, in an act containing more than a hundred distinct articles, which, with few variations, are now the law, whereby the mode of organizing, officering, and governing the officers and men was regulated with great minuteness. The fifty-eighth article declares that—

"All public stores taken in the enemy's camp, towns, forts, or magazines, whether of artillery, ammunition, clothing, forage, or provisions, shall be secured for the service of the United States, for the neglect of which the commanding officer is to be answerable."

Surely the men who made and put into operation the Constitution understood very little of its provisions when they passed such a law as this, if my colleague is right in his assertion that "the war-executing powers are vested in the President, in the executive department of the Government, and Congress has no more right to touch them or exercise them than it has to usurp and exercise the judicial functions of the Government." How the Senator from Pennsylvania who declared, with such self-complacency, that the President "was invested with the war-making power," that "he is the commander directing and controlling it as he pleases," must be shocked at the ignorance of our fathers of the meaning of the Constitution they had made, when he reads over the hundred and one articles of war, and particularly the fifty-eighth article, which directs what is to be done with the public stores taken in the enemy's forts and camps.

4. The advocates for this arbitrary power in the

President, without limitation or restraint of any kind, will find as little support for the assumption in judicial decisions as in the Constitution and the practice of the Government. Does not my colleague know that all which he quoted from the opinion of the court in the case of *Luther vs. Borden*, had reference to the power of the President in calling out the militia in subordination to an act of Congress, and had no reference whatever to his power under the Constitution independent of such an act? Does he not know that without such act he could not call forth a man even to suppress insurrection or repel invasion? If not, I refer him to the Constitution, which declares that "Congress shall have power to provide for calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasion." That it was of the powers vested in the President by virtue of an act of Congress passed in pursuance of this clause of the Constitution of which the court spoke in the extracts read by my colleague, and not of the President's power under the Constitution independent of such an act, will be apparent from a glance at a part of the opinion which my colleague did not read. The court say:

"The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guaranty to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the Legislature, or of the Executive, (when the Legislature cannot be convened,) against domestic violence. Under this article of the Constitution, it rests with Congress to decide what government is the established one in a State.

"So, too, as relates to the clause in the above-mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the Federal Government to interfere. But Congress thought otherwise, and no doubt wisely; and by the act of February 28, 1795, 'provided that, in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on application of the Legislature of such State, or of the Executive, (when the Legislature cannot be convened,) to call forth such number of the militia of any other State or States as may be applied for as he may judge sufficient to suppress such insurrection.' By this act the power of deciding whether the exigency had arisen upon which the Government of the United States is bound to interfere is given to the President."

What now becomes of this case as an authority to show that the President possesses the war power without any act of Congress, when the court say "*by this act*" not by the Constitution

"the power of deciding whether the exigency had arisen, upon which the Government of the United States is bound to interfere, is given to the President;" and that Congress "might, if they had deemed it most advisable to do so, have placed it in the power of the court to decide when the contingency had happened which required the Federal Government to interfere?" Because the court in a subsequent part of their opinion argue to show that the President, by virtue of his high office, was a proper person for Congress to vest with this power, my colleague insists that therefore he had it from the Constitution, when the court expressly say he gets it from the act of Congress. My colleague, by parenthetically inserting a few words in his quotation of detached sentences of this opinion entirely perverts its meaning. This will, I think, be apparent on my reading from his speech some of the quotations with the interpolations. Take the following:

"After the President [not Congress] has acted and called out the militia, is a circuit court of the United States authorized to inquire whether his decision was right?" *

* * * "It is said that this power [the war power] in the President is dangerous to liberty, and may be abused."

It will be observed that the words "not Congress" and the words "the war power" are interpolations. Now, the action of the President and his power here spoken of were the action and power to call forth the militia under act of Congress, and not a denial of the power of Congress itself to do it nor of "the war power," as the interpolated parentheses would indicate.

But, sir, another decision of the Supreme Court of the United States disposes of all these questions, decides that the power of confiscation is vested in Congress and nowhere else, that the President possesses no such power under the law of nations, and that the modern usage or law of nations does not of itself by its own force constitute a rule which acts upon property except through the sovereign power, the legislature. I refer to the case of *Brown vs. The United States*, reported in 8 Cranch, (page 110,) in which the court say:

"Respecting the power of Government no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall

be expressed, no power of condemnation can exist in the court." * * * * *

"War gives an equal right over persons and property; and if its declaration is not considered as prescribing a law respecting the person of an enemy found in our country, neither does it prescribe a law for his property. The act concerning alien enemies, which confers on the President very great discretionary powers respecting their persons, affords a strong implication that he did not possess those powers by virtue of the declaration of war.

"The 'act for the safe-keeping and accommodation of prisoners of war,' is of the same character.

"The act prohibiting trade with the enemy contains this clause: '*And be it further enacted*, That the President of the United States be, and he is hereby, authorized to give, at any time within six months after the passage of this act, passports for the safe transportation of any ship or other property belonging to British subjects, and which is now within the limits of the United States.'

"The phraseology of this law shows that the property of a British subject was not considered by the legislature as being vested in the United States by the declaration of war; and the authority which the act confers on the President is manifestly considered as one which he did not previously possess.

"It is urged that, in executing the laws of war, the Executive may seize and the courts condemn all property which, according to the modern law of nations, is subject to confiscation; although it might require an act of the legislature to justify the condemnation of that property which, according to modern usage, ought not to be confiscated.

"This argument must assume for its basis the position that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power. This position is not allowed. This usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign, and although it cannot be disregarded by him without obloquy, yet it may be disregarded.

"The rule is, in its nature, flexible. It is subject to infinite modification. It is not an immutable rule of law, but depends on political considerations, which may continually vary.

"Commercial nations, in the situation of the United States, have always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question, what shall be done with enemy property in our country, is a question rather of policy than of law. The rule which we apply to the property of our enemy will be applied by him to the property of our citizens. Like all other questions of policy, it is proper for the consideration of a department which can modify it at will, not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary.

"It appears to the court, that the power of confiscating enemy property is in the legislature, and that the legislature has not yet declared its will to confiscate property which was within our territory at the declaration of war."

Chief Justice Marshall, in this opinion, effectually disposes of the assumption that the Executive may seize and the courts condemn all property

which, according to the modern law of nations, is subject to condemnation, as well as of that other assumption that there is a law of nations higher and above the sovereign power of the State, by declaring that such law is but a guide which the sovereign follows or abandons at will, and that although it cannot be disregarded without obloquy, yet it may be disregarded. If this were not so, the extraordinary spectacle might be presented of the courts of a country disavowing and annulling the acts of their own Government in matters of state and political diplomacy.

Another objection urged to the bill is, that it confiscates the property of all absent rebels, including those who have been unwillingly forced into the confederate service as well as those who have voluntarily entered it. A moment's reflection must satisfy all that this objection is without force, for no court or commission would ever enforce a penalty against a person who had been compelled by force to commit the act of forfeiture. The principle of law is too well settled to require discussion, that no man can be held responsible for acts which he had not the power to prevent; nor is any saving clause necessary in the bill to protect the property of those forced into the rebellion from forfeiture, any more than there is for such a clause to protect a man found among a band of robbers or pirates, when he was able to show that he had been forced to join them. But if the bill were obnoxious to this objection, which, in my opinion, it is not, it would be easy to obviate the difficulty by limiting its operation to the property of such absent persons as shall join the rebellion without restraint.

Having shown, as I think, that the bill is not of the sweeping character represented by Senators who have spoken against it, that it is not obnoxious to the charges of unconstitutionality which they have made, and that the war power is not in the President, but in Congress, which has exercised it from the foundation of the Government, I assume, as positions which cannot be successfully controverted, that Congress, in providing for the prosecution of the war against the rebels, has a right to direct that such means shall be resorted to as it believes necessary and proper for the attainment of the end of the war, which is the suppression of the rebellion; and that no court can set aside or annul any action which Congress may take in the premises, for the reason that the Constitution, by vesting in Congress the express power "to declare war," "to raise and support armies,"

provide for their government, "make rules concerning captures on land and water," and for suppressing insurrection by force, has vested it also with the discretion of determining what means are necessary and proper to enable it to carry into effect these granted powers. It does not belong to the courts to determine how a war shall be prosecuted, or what shall be done with the persons or property of an enemy. Those are questions depending on political considerations, which may continually vary, and to be judged of by the sovereign power, which in this country is the people, who speak through their Representatives in Congress so far as war matters are concerned. All the courts can do is to aid in giving effect to the sovereign will when expressed. The position that in executing the laws of war, the Executive may seize and the courts condemn all property, which, according to the modern law of nations is subject to confiscation, in the language of the Supreme Court already quoted, "is not allowed," because this law of nations, as the court say, is only "a guide which the sovereign follows or abandons at his will." It is wholly dependent on our Government for its being recognized here at all. The rule in regard to the seizure and appropriation of enemy property is stated in these words by writers on international law:

"From the moment one State is at war with another, it has, on general principles, a right to seize all the enemy's property, of whatsoever kind and wheresoever found, and to appropriate the property thus taken to its own use or to that of the captors."

My colleague in speaking of belligerent rights, said:

"One of these is the right to take, confiscate, appropriate, and dispose of, as we please, absolutely and forever, all the movable property of every kind and character belonging to the enemy individually and collectively, which has any relation to the end of the war, and which tends to our advantage by strengthening us or by weakening the enemy, and diminishing his ability to carry on the war and do us injury.

"The exercise of this belligerent power, the assertion of this belligerent right of seizure and confiscation, in no sense and to no extent endangers the liberty of the citizen, nor is there the least occasion for alarm in that regard."

This may seem strange language on the part of my colleague, when compared with another part of his speech, in which he denounces this bill, which does not propose to touch the property of a single rebel, even, whose person is within the reach of judicial process, in these words:

"The sure and certain effect of this bill would be to make peace and reunion an impossible thing. It would fill the

hearts of the entire people with despair, and nerve their arms with the energy and desperation which despair inspires. It would turn to the blackness of night the last glimmering hope of future fraternity between now alienated and exasperated brethren."

What so alarms and horrifies my colleague and the Senator from Pennsylvania [Mr. COWAN] is not that rebel property, to a limited extent, is proposed to be confiscated, but that it is proposed to be done in pursuance of laws enacted by the people's representatives in Congress assembled, and not left to the will and caprice of the President, without limitation or restraint of any kind or character upon his power; and that, too, as I insist, and think I have shown, in defiance of the very terms of the Constitution, and of the well-considered decision of the Supreme Court in the case of *Brown vs. United States* already referred to.

But my object in making these quotations from my colleague's speech was not to expose his inconsistencies, but to establish what were the rights of a belligerent, as even the opponents of this bill admit. I admit the correctness of my colleague's definition, except in his limitation of the power of confiscation to "movable property." Neither the elementary writers upon international law or the Supreme Court make any such limitation. Its propriety is another question; and for one, I am unwilling that rebel chiefs, like Slidell and Mason, who are said to be large landholders in the loyal States, and have escaped to foreign lands, should be permitted to enjoy the fruits of their estates situated within our jurisdiction, while the lives and property of thousands of loyal men have been sacrificed and a debt incurred which will be a burden on the country for generations to come in consequence of the wicked rebellion which they have inaugurated.

That we have the right to exercise belligerent rights towards the persons and property of those in arms against the Government, and who are fighting for its overthrow, even the opponents of this bill admit. When a rebellion becomes so formidable as to be able to muster armies of hundreds of thousands of men and maintain itself in arms against the forces of the Government for almost a year, it surely has attained a magnitude entitling it to be called a civil war; and international law writers agree that the common laws of war are to be observed in a civil war in the same manner as in a war between independent States. If, therefore, in waging war against a foreign nation, the United States could confiscate the property of the enemy through an act of Congress, the

and only in pursuance of an act of Congress, as decided by the Supreme Court, it follows that they may now confiscate the property of the rebels. It matters not whether the war we are waging be with foreign or domestic enemies, our rights against them are the same while the war continues; and in the prosecution of the war we have a right, for the time being, to treat all parts of the country which are in possession of the rebels, and where the laws of the Union are overborne, as foreign.

This principle was settled by a decision of the Supreme Court in the case of the *United States vs. Rice*, (4 Wheaton, 246,) in which it was held that the town of Castine, in Maine, which was taken possession of and occupied by the British for several months during the war of 1812, was, while in their possession, as respects our revenue laws, to be deemed a foreign country, so that goods imported into it were not imported into the United States, nor subject to the payment of duties; and if a portion of the Union occupied by the enemy may be treated as foreign for revenue, why not also for confiscation purposes? All the departments of the Government—executive, legislative, and judicial—have, for certain purposes, already treated those parts of the Union in possession and under the control of the rebels as foreign, and the rebels themselves as enemies or belligerents. This has been done by the passage of a non-intercourse act; by the blockade of the rebel coast; by the condemnation, as lawful prize, of vessels attempting to run the blockade; by the interchange of flags of truce, the exchange of prisoners, and in various other ways. Thus treating a portion of the Union as foreign for war purposes, and the rebels as belligerents, while it gives us, during the continuance of the war, all the rights which we could exercise against the property and persons of foreign enemies, does not impair our right when the laws of the Union shall be established over the rebellious districts, and the rebels themselves reduced to subjection, to treat them as traitors and punish them for their crimes, which I trust will be done, at least so far as the leaders are concerned.

Vattel, who insists that the common laws of war should be observed in every civil war, says on this subject:

“When the sovereign has subdued the opposite party, and reduced them to submit and sue for peace, he may except from the amnesty the authors of the disturbances—the leaders of the party; he may bring them to a legal trial, and punish them if they be found guilty.”

But it is said the passage of this bill, admitting its constitutionality, would be inexpedient; that it would make the rebels desperate, and unite the South as one man against the Union. How so, let me ask? It does not propose to touch the property of any loyal citizen, and why, therefore, should it drive him against the Union? Are there no loyal persons in the South, or is their love for the traitors who have driven them from their homes and robbed them of their property so strong that rather than take rebel property to help defray the expense of maintaining the Government against the rebellion, they would themselves turn traitors? Surely this would exhibit a weakness and compassion for enemies, and a malignity and hatred of friends, such as the world never before witnessed. Besides, sir, not to confiscate the property of rebels is to encourage future rebellions. Wherever the rebels bear sway they have not hesitated to confiscate the property of loyal citizens; and if now, as the authority of the Union is restored, the persons who have robbed loyal citizens are to be protected in their property, what is it but saying to the people of the country, that whenever a future insurrection arises, the sure way to protect their property will be to join in it; and what is this but to offer a premium for treason? To show the effects of this in individual cases, I quote from a letter received within a few days from a gentleman in New York, who says:

“I hold a mortgage for \$35,000 on a plantation sold by me in Mississippi. This plantation is not far from one belonging to Jeff Davis. My mortgage is confiscated; myself and family are heavily embarrassed by engagements predicated upon this mortgage. We are innocent parties; Jeff Davis is guilty; and why should he be allowed to escape unharmed after entailing bankruptcy upon loyal individuals and desolation through a whole section?”

This is but one case of which there are hundreds of thousands all through the South. But few of those engaged in this rebellion will ever be made to suffer in their persons; and if they are to be left in the full possession and enjoyment of their cotton, their lands, and their negroes, the innocent will have been made to suffer while the guilty will go unpunished. The enhanced price which the rebels will get for their sugar and cotton at the close of the war will contribute largely towards making up the losses they have incurred by their rebellion, while loyal farmers, manufacturers, merchants, and, indeed, all classes of loyal citizens both North and South, will be impoverished to the extent of \$1,000,000,000. Tens of thousands of lives will be sacrificed, hundreds of thousands of men will

be crippled for life, hundreds of thousands of others will be left orphans on the bounty of the nation, while the authors of all this misery will escape almost entirely unhurt, unless their property is made to pay the penalty. Is this just? Shall the innocent, loyal, and patriotic citizens of my own State, who have contributed so liberally of their blood to the maintenance of the Union and the preservation of constitutional liberty, be deprived of their property to pay the expenses of this war, while they who prosecute it against the Union are permitted to enjoy theirs? Shall the fathers of the gallant sons whose mangled bodies have been borne back to Illinois by hundreds, from the bloody fields of Belmont, of Donelson, and Pea Ridge, be ground down by onerous taxes, which shall descend upon their children to the third and fourth generations to defray the expenses of defending the Government against traitors, and we forbear to touch even the property of the authors of these calamities, whose persons are beyond our reach? Suppose ye that the loyal people of this country will submit to such injustice?

I believe I represent as loyal, as patriotic, and as brave a constituency as any other Senator. I claim nothing more. If western men have fought more battles and won more victories for the Union than their brethren of the East, it is because they have had more opportunities. It has been their good fortune to be led against the enemy instead of being idly confined in camps. The capture of Newbern, chiefly by New England troops under the gallant Burnside, shows that the eastern army needs but to be led against the enemy to drive him from Virginia and the Carolinas as effectually as he has been expelled from Missouri and Kentucky. While, therefore, I am proud of the part which the soldiers of my own State took in defeating the enemy in the West, I do not claim for them any superiority over the other soldiers of the Republic. The brave men who besieged Donelson, and who, after fighting through the day for three consecutive days, lay each night on the ground without shelter, exposed to the rain and the sleet, were chiefly Illinoisans. It was there that rebellion received the heavy blow which has staggered it ever since. Forty dead bodies were borne from that bloody field to one small town in my State and buried in a common grave. The Union forces at Pea Ridge were also largely made up of soldiers from Illinois. Suppose ye, that I can go back to Illinois, among the relatives of those who have been cruelly destroyed, and pro-

pose to levy taxes upon them in order to conciliate and compensate the murderers, for that is really what exempting rebel property from confiscation amounts to? Sir, I know not if they would submit to such injustice; and yet there are those who not only talk of an amnesty to the men who have brought these troubles upon the country, but oppose providing the mild punishment of confiscation of property for those who shall continue hereafter to war upon the Government, and whose persons are beyond our reach. I am surprised that a bill of this character should meet with opposition from Senators of the border States whose loyal citizens the rebels, whenever they have had the power, have robbed, plundered, and driven from their homes. Do gentlemen regard it as conciliatory to oblige us to lay taxes upon those whose habitations have been consumed, to reward those who have burned them? upon those whose whole property has been stolen, to reward the thieves? upon those whose relatives have been slain, to compensate the murderers? In my judgment, justice, humanity, and mercy herself, all demand that we at once provide that the supporters of this cruel and wicked rebellion should henceforth be made to feel its burdens.

To the most important features in the bill under consideration I have thus far made no allusion. They are the second and third sections of the bill. The second section is in these words:

And be it further enacted, That every person having claim to the service or labor of any other person in any State under the laws thereof, who during the present rebellion shall take up arms against the United States, or in any manner give aid and comfort to said rebellion, shall thereby forthwith forfeit all claim to such service or labor, and the persons from whom it is claimed to be due, commonly called slaves, shall, *ipso facto*, on the commission of the act of forfeiture by the party having claim to the service or labor as aforesaid, be discharged therefrom, and become forever thereafter free persons, any law of any State, or of the United States, to the contrary notwithstanding. And whenever any person claiming to be entitled to the service or labor of any other person shall seek to enforce such claim, he shall, in the first instance, and before proceeding with the trial of his claim, satisfactorily prove that he is and has been during the existing rebellion loyal to the Government of the United States. And no person engaged in the military or naval service of the United States shall, under any pretense whatever, assume to decide on the validity of the claim of any person to the service or labor of any other person, or to surrender up any such person to the claimant.

The third section makes it the duty of the President to provide for the colonization and protection, as freemen, in some tropical country, of such of the African race made free by the previous section,

as may desire to emigrate. Slavery is admitted, by most loyal citizens, to have been the cause of this wicked rebellion; and it is also very generally admitted that the Federal Government has no power under the Constitution to remove this cause by abolishing slavery in the States. I, in common with Republicans generally, have often declared that Congress was not responsible for and had no power under the Constitution to interfere with slavery in the States. I say so to-day; and because the Republican party generally has maintained this position, the Senator from Pennsylvania, [Mr. Cowan,] in the name of Republicanism, arraigns those of us who are in favor of this bill as acting inconsistently with our professions. He has probably been misled by the title of the bill, which might more properly be styled a bill to discourage rebellion, than "a bill to confiscate the property and free the slaves of rebels;" for, sir, this bill does not make a rebel of anybody, nor of itself free a single slave. If a slave gets his freedom under it, it will be by the voluntary act of his rebel master. Surely the Republican party never pledged itself not to pass a law to punish rebels.

Suppose before this rebellion broke out a slave had been detected in robbing the mail: would the Senator from Pennsylvania have considered the Republican party bound by its pledges not to punish the slave for his crime, lest in so doing it should interfere with slavery? Suppose a servile insurrection to have broken out in some southern State, and the State to have called on the Federal Government to furnish aid for its suppression: would the Senator have considered the Republican party bound not to respond to this constitutional call lest it should interfere with slavery in a State? Or suppose the slaves of the South should be armed by their rebel masters and marshaled to fight against the Union: would the Republican Senator from Pennsylvania hesitate to direct the Union armies to shoot them on the battle-field, lest in so doing they should interfere with slavery? I presume the Senator would do none of these things. Neither Congress nor the General Government can do anything directly for the purpose of interfering with slavery in a State. This I admit to its fullest extent; but Congress may and ought to provide for the punishment of crimes committed against the laws of the Union; it may and ought to provide for the suppression of rebellion; and if in doing this slavery suffers, or is interfered with, it is not the Government which makes the interference, but they who violate the laws and war against the

Government. So, if any slave shall ever obtain his freedom under this bill, it will be in consequence of the acts of his rebel master, and I am not aware that the Republican party ever pledged itself not to allow the owners of slaves to make them free.

I would to God that every rebel in the land would to-morrow ground the weapons of his rebellion, return to his allegiance, and to obedience to the laws and Constitution. In that event this bill if passed into a law would have no effect either upon his property or his slaves; but if he will continue in rebellion against the Government, to plunder and murder loyal citizens, I have never pledged myself as a Republican not to mete out to him the punishment his crimes deserve. If this rebellion should result in freeing the slaves of rebels, it will not be the first time in the history of the world that good has come out of evil; but it will not be the act of Congress which makes them free any more than it is the act of Congress punishing the crime of larceny that makes a man a thief.

It has been said that Congress possesses no more power to pass this bill now than in a time of peace. I assent to the proposition, and insist that it would have been perfectly competent for Congress to have passed such a bill at any time. Like all criminal laws, it would remain inoperative upon the statute-book till the offense was committed for which it provided the penalty, when it would come into play for the purpose of punishing the offenders. It so happens, in the providence of God, that most of those who own slaves are now in arms against the Government. This gives to the Government the power to destroy them and all they possess if necessary to suppress the rebellion; and Congress is vested by the Constitution with the discretion of determining what means shall be used to accomplish the object; not only so, but it is made the duty of Congress to provide for suppressing the insurrection. In making this provision, is it not wise that Congress should so act, that if men will fight and war against the Government, they shall not do so without the loss of that species of property which has been the impelling power to drive them into rebellion, and thereby take away any motive for repeating the experiment when this rebellion shall have been suppressed? Such an opportunity to strike a blow for freedom seldom occurs as that now presented to the American Congress.

As most of the owners of slaves are engaged in

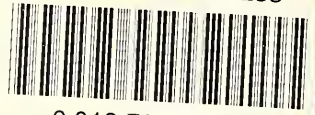
the rebellion, and will probably continue so for some time, the effect would be, if this bill were speedily enacted into a law, that they would by their own act give freedom to most of the slaves in the country, and thus would be solved, in a great measure, through the agency of this wicked rebellion, the great question, what is to be done with African slavery? a subject in view of which Jefferson, in his day, exclaimed, that "he trembled when he remembered that God was just." I appeal to Senators as philanthropists, as patriots, as lovers of the Union and of constitutional liberty, not to let pass this opportunity which a wicked rebellion presents, of making it the means of giving freedom to millions of the human race, and thereby destroying to a great extent the source and origin of the rebellion, and the only thing which has ever seriously threatened the peace of the Union.

Having, as I think, shown that the right to confiscate enemy property exists; that for this purpose the rebels may properly be treated as enemies;

that confiscation can be effected only through an act of Congress; that the bill under consideration is constitutional; and that it is both wise and expedient to take from those who shall continue to fight against the Government after the passage of this act, and whose persons are beyond the reach of punishment, their property and their slaves so far as they are within our reach, I appeal to all those who favor these views to stand together, and let us pass the bill at as early a day as possible, with such modifications and amendments as may be thought advisable, not losing sight of the great object in view. It is no time to talk of amnesties and conciliation, when the habitations of loyal citizens are being plundered and their lives destroyed. When the rebels, whose hands are dripping with the blood of loyal citizens, shall have grounded their arms, it will be time enough to talk of clemency; but to have our sympathies excited in their behalf now, when fighting to overthrow the Government, is cruelty to the loyal men who have rallied to its support.



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